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JUVENILE LAW, BEFORE AND AFTER THE ENTRANCE OF "PARENS PATRIAE"

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> The Latin phrase [parens patriae] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.†

> It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.††

Until recently, juveniles have been excluded from the "constitutional scheme" partly because "parens patriae" was thought to give the state some special power over them.[1] The use of the phrase somehow prevented the balancing we engage in when state and individual interests are in conflict.

This article examines juvenile law in chancery (traditionally called "infant law"), before and after "parens patriae" became a part of it. It shows that "parens patriae" became a helpful synonym for various state interests that the chancellor desired to further: among them, the preservation of juvenile estates; the furtherance of juvenile education; and the protection of juveniles from improper marriages. Hopefully, this paper puts to rest the notion that "parens patriae" was or is anything more, so that, when they are in conflict, state and juvenile interests can be balanced as usual.

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† *In re* Gault, 387 U.S. 1, 16 (1967).

†† Hyde v. United States, 225 U.S. 347, 391 (1917). (Holmes, J., dissenting).

1. Among the older American cases, *compare Ex parte* Crouse, 4 Whart. 9 (Pa. 1839); Roth and Boyle v. House of Refuge, 31 Md. 329 (1869); The Milwaukee Indus. School v. Supervisors of Milwaukee County, 40 Wis. 328 (1876); Petition of Ferrier, 103 Ill. 367 (1882) *with* People *ex rel.* O'Connell v. Turner, 55 Ill. 280 (1870); State *ex rel.* Cunningham v. Ray, 63 N.H. 406 (1885). Among more recent cases, *see In re* Gault, 387 U.S. 1 (1967); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

I. The Early Cases

In this section, I shall trace the early development of the chancellor's jurisdiction over infants.

A. Late 14th to Early 15th Centuries

One of the king's feudal incidents from land held of him by knight service was the wardship of his tenants' infant heirs.[2] A Wardship was profitable since the king could sell it for revenue. In 1401,[3] a buyer named Prophete was dissatisfied. He therefore petitioned the king's chancellor, the Bishop of Exeter, for relief. Prophete, it seems, had been granted the wardship of an infant whose father had held a manor of the king by knight service. One Smart, the petition continued, had entered the manor and had taken its profits for a year or more. Prophete prayed that the chancellor would not allow

> the said Roger Smart to go away until he had made accord to the King and to the said suppliant . . . and that he [the chancellor] may find sufficient surety that henceforth he will not attempt anything against the King, nor the said John Prophete, touching the said manor.[4]

No note was taken of the ward's welfare, only of the lost profits. The chancellor was appealed to in order to protect a mercenary guardian and an enterprising king's interest.

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2. "Our Lord the King shall have the Ward of all the Lands of such as hold of him in chief by Knights service, whereof the Tenants were seised in their demean as of Fee at the day of their death (of whomsoever they hold else by like service, so that they held of ancient time and land of the Crown) until the Heir come to his lawful age . . . ." Prerogativa Regis, 17 Edw. 2, c. 1 (1324), translation taken from 1 Statutes at Large 376-77 (Pickering ed. 1762). Holdsworth refers to this statute as the "so-called statute." 1 W. Holdsworth, A History of English Law 473 (7th ed. 1966) [hereinafter cited as Holdsworth: citations to 4, 5 and 6 Holdsworth are taken from the 1924 editions]. Holdsworth says that "it is one of a group of anomalous documents inserted in legal *MSS.* between the ending of the "Vetera Statuta" in the last year of Edward II.'s reign, and the beginning of the "Nova Statuta" in the first year of Edward III.'s reign . . .; throughout the Middle Ages it was accepted as a genuine statute; it may have been merely private work, or have emanated from some official on the instructions of the king; its date is between 1255 and 1290." *Id.* at 473 n.8. *See* F. Maitland, *The 'Praerogativa Regis,'* 6 Eng. Hist. Rev. 367 (1891).

3. Prophete v. Smart, W. Baildon, Select Cases in Chancery (1364-1471) 51 (No.47) (Ch. 1401) (Selden Society 1896) [hereinafter cited as Select Cases; care should be taken, however, since the Selden Society has published other collections of "select cases"]. I have taken the liberty of naming the cases in this paragraph.

4. *Id.* at 51-52.

In *Masham v. Sabarn*,[5] a petition was addressed between 1413 and 1417 to the chancellor, the Bishop of Winchester, by John de Masham. He held land to the use and profit of the lord of Beaumont, who had held of the king. Beaumont had died and left an infant son. Thomas Sabarn and eleven others, in the meantime, had entered the land and turned it "into common."[6] De Masham appealed not as a dissatisfied buyer, as had Prophete. He used a different tactic. He appealed to the chancellor as the king's delegate, in whom the king's guardianship of his wards rested. De Masham prayed that the infant would not be disinherited. For the first time, the chancellor was being asked to care for an infant.

In *White v. White*,[7] between 1399 and 1413, a widow petitioned the king's chancellor, Thomas de Arundel, Archbishop of Canterbury. She asserted that her late husband willed her the profits of certain lands and the guardianship of their daughter during the daughter's nonage. One Thomas White, the petition asserted, had taken both the profits of the lands and the daughter. The widow prayed for their restoration. It is probable that the widow could have maintained trespass against Thomas White.[8] She chose instead to go into chancery and base her relief upon the will.[9] Hence, through the chancellor's adjudication upon a will, he was asked to exercise jurisdiction over the infant. Since the petition did not concern land held of the king, the infant daughter was not a *ward belonging to the king*. The chancellor's exercising jurisdiction over the infant in *White* represented an acquisition of jurisdiction by him. He was acting not as guardian to the king's wards but as caretaker to infants generally. This represents one way the chancellor began enlarg-

5. SELECT CASES 112 (No. 115) (Ch. 1413-1417).
6. *Id.* at 113.
7. SELECT CASES 95 (No. 100) (Ch. 1399-1413).
8. Coke recognized the existence of a guardian *per cause de nurture*. E. COKE, COMMENTARY UPON LITTLETON 88b (17th ed. Hargrave and Butler 1817) [hereinafter cited as CO. LITT.; first published 1628]. "As the guardianship by *nurture*, it only occurs where the infant is without any other guardian; and none can have it, except the father or mother. . . . It extends no further than the custody and government of the infant's person, and determines at fourteen in the case both of males and females." *Id.* at 88b n.14 (by Hargrave). If the father were dead, the mother would become the guardian for nurture. She could then bring trespass against a stranger who took the infant away. *See* W. MACPHERSON, LAW RELATING TO INFANTS *60 (1843).
9. The chancellor's jurisdiction in the estates area is just beginning at the time of this case. 5 HOLDSWORTH 288-89, 316-20. This case was evidently brought before the chancellor because Thomas White claimed possession by deed from the widow's late husband. The will relied upon by the widow was probably written after the deed was given. The chancellor thus was faced with a problem of revocation by subsequent instrument.

ing his jurisdiction over infants, *i.e.*, began exercising his care for infants.[10]

B. Late 16th Century

The next period for which there are petitions and reports of interest is the second half of the sixteenth century.[11] These petitions and reports indicate two enlargements of the chancellor's jurisdiction over infants, both related to other areas of his cognizance.

One area, of which we have already seen examples,[12] is that of estates. It was early settled that the guardian of a tenant in socage's infant heir was the next of kin to whom the tenant's estate could not descend.[13] Thus, when a tenant in socage died intestate, and there arose a quarrel as to whom the estate could or might descend, the situation was ripe for a relative to petition the chancellor to settle the question and to ask to be appointed guardian. When Nicholas Robynson died intestate, leaving Robert Robynson an infant heir, Peter Higson, the infant's

10. *See* 5 HOLDSWORTH 303. *White* is an instance of what MacPherson calls "testamentary guardianship at common law." W. MACPHERSON, *supra* note 8, at *68. "There is reason . . . to think, that where there was no other guardian marked out by the law, testamentary dispositions of the guardianship of children were not unknown, even before the statute of Charles II." W. MACPHERSON, *supra* note 8, at *68. MacPherson's reference is to An Act for Taking Away the Courts of Wards and Liveries, 12 Car. 2, c. 24, § 8 (1660), whereby fathers were given the right, by deed or will, to appoint guardians for their children after their decease. Hargrave, on the other hand, considers the statute as creating a *new* kind of guardianship. Co. LITT. 88b n.15. MacPherson's and Hargrave's opinions are reconcilable. MacPherson's father could not appoint a guardian by deed or will where there was a guardian in chivalry. After the statute, guardianship in chivalry was abolished. 12 Car. 2, c. 24, §§ 1, 2, 4. A father could then appoint a guardian by deed or will whenever he desired to.

11. The petitions in this paragraph come from CALENDARS OF THE PROCEEDINGS IN CHANCERY (1827-1832) [hereinafter cited as PROCEEDINGS IN CHANCERY]. PROCEEDINGS IN CHANCERY is a collection of petitions from the reign of Queen Elizabeth (1558-1603). MacPherson has evidently gone through the hundreds of unindexed pages of the three volumes of PROCEEDINGS IN CHANCERY. His welcome citations are being used herein. W. MACPHERSON, *supra* note 8, at *102 n.h. Prefixed to PROCEEDINGS IN CHANCERY are "examples" of petitions of earlier proceedings. One such petition is that of Thomas, Duke of Gloucester, who asserted that he was ousted from possession of certain lands, the custody of which he had been given by the king as a guardian in chivalry. 1 PROCEEDINGS IN CHANCERY i (Ch. 1392). In another, two gentlemen who detained infant wards of the king, were committed to the Fleet. Sotehill v. Harrington, 1 PROCEEDINGS IN CHANCERY lxxxvi (Ch. 1469). From 1469 until Burgh v. Wentworth, Cary 54, 21 Eng. Rep. 29 (Ch. 1576), I have found nothing of note. DYER'S REPORTS, which covers the period and contains some chancery cases, is not helpful.

12. *See* note 9 *supra*.

13. *See* H. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE f.87b (Twiss ed. 1879) [first published 1259?]; 2 LITTLETON'S TENURES c. 5, § 123 [first published 1481?], quoted in Co. LITT. 87b; W. MACPHERSON, *supra* note 8, at *19.

uncle by his *mother's* side (hence not capable of taking by descent), petitioned the chancellor to be appointed guardian.[14] In *Sweetman v. Edge*,[15] the chancellor did not grant the petition of a grandfather by the *mother's* side against the grandfather by the *father's* side "to have the education and bringing up of one Richard Edge, an infant, who is seised of an estate tail of lands, the remainder to the defendant."[16] The chancellor thought the infant adequately protected since "it appeared there were divers remainders between the defendants [sic] and the infant's estates."[17]

The second area of the chancellor's cognizance, which was helpful in enlarging his jurisdiction over infants, was in the taking of accounts.[18] Proceedings In Chancery contains three abbreviated petitions for accountings. In *Walford v. Mott*,[19] an infant brought a petition for an accounting of the rents and profits from lands of which the defendant guardian in socage was in possession during the infant's minority. Another petition, *Sharp v. Tull*,[20] is to the same effect. *Sewell v. Barratt*[21] is a petition for an accounting from a customary guardian. In Cary's Reports, *Burgh v. Wentworth*[22] is noteworthy for the relief prayed for, namely an accounting of the "profits by him [the guardian] taken of the lands of the plaintiff during his minority, for fines of leases, woodsales, and wilful decay of houses."[23] Having exercised his concern for infants by deciding guardianship disputes, the chancellor, through these petitions, began protecting the same infants from their guardians.

C. Early 17th Century

The beginning of the seventeenth century saw a greater concern by the chancellor for the care of infants.[24] In three cases, which evidently the chancellor had because estate issues he adjudicated were presented, we have the following brief orders:

14. Higson v. Worlyche, 1 PROCEEDINGS IN CHANCERY 405 (Ch. 1558-1603?).
15. Cary 96, 21 Eng. Rep. 51 (Ch. 1577-1578).
16. *Id.*
17. *Id.*
18. "[B]y the end of the fifteenth century, the mere fact that the case involved the taking of accounts was sufficient ground for the interposition of the chancellor." 5 HOLDSWORTH 288.
19. 3 PROCEEDINGS IN CHANCERY 293 (Ch. 1590).
20. 3 PROCEEDINGS IN CHANCERY 96 (Ch. 1586).
21. 3 PROCEEDINGS IN CHANCERY 89 (Ch. 1594).
22. Cary 54, 21 Eng. Rep. 29 (Ch. 1576).
23. *Id.*
24. The cases from TOTHILL are due to Holdsworth. 5 HOLDSWORTH 315 n.8.

> [C]hildren allowed seven or eight pounds *per centum* for their education, where there is no allowance by the will;[25]
>
> executors ordered to put in good security to allow five pounds *per centum* for education, and to make good their portions;[26]
>
> the defendant's wife being *priviment ensient* at her husband's death, the child could not be provided for by law, but the Court ordered that the child should have sufficient allowance.[27]

From these orders it cannot be said that the chancellor had the care of *all* infants, but it can be surely said that once an infant was before him upon a proper bill he exercised what care he could.[28]

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25. Bright v. Chappell, Tothill 6, 21 Eng. Rep. 106 (Ch. 1629-1630).
26. Barwick v. Barwick, Tothill 52, 21 Eng. Rep. 121 (Ch. 1601-1602).
27. Pope v. Moore, Tothill 93, 21 Eng. Rep. 133 (Ch. 1627-1628 or 1605-1606).
28. A short discourse on the Court of Wards and Liveries is necessary. It is inserted in a footnote because its relevance to the development of chancery's jurisdiction over infants was not positive. Holdsworth believes, and probably rightly, that its existence fettered that development. *See* 5 HOLDSWORTH 309-10, 315.

The Court of Wards and Liveries was established by two statutes, 32 H. 8 c. 46 (1540) and 33 H. 8 c. 22 (1541). To this court were transferred "all wards which the kings highnesse now is, or hereafter shall be intituled to have, with their mannors, lands, tenements, rents, remainders, reversions, services, and all other hereditaments whatsoever they be . . . all and every of the kings widows that now be, or hereafter shall be, and that have married themselves without the kings license . . . for their reasonable fines to be made to the kings use . . . all and singular ideots and naturall fools now being in the kings hands, or that hereafter shall come and be in the kings hands . . . ." E. COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND **187-89 (1797) [hereinafter cited as FOURTH INSTITUTE; first published 1641]. The reason for the establishment of the court was to make more efficient the collection of the king's feudal revenues. H. BELL, AN INTRODUCTION TO THE HISTORY AND RECORDS OF THE COURT OF WARDS AND LIVERIES 13 (1953).

The effect which this court had upon chancery should be plain. It took many cases from chancery's cognizance, cases through which chancery's jurisdiction over infants could have grown. Evidently chancery respected the Court of Ward's exclusive jurisdiction over wards of the king. *See* C. MONRO, ACTA CANCELLARIAE 392 (No. LXXIX) (1847). And evidently the Court of Wards "jealously guarded its jurisdiction." H. BELL, *supra*, at 110. Moreover, having taken many cases from chancery, the Court of Wards, as its purpose would indicate, did not expand its jurisdiction to care for its infant wards. In fact, "for the most part it acted in accordance with precedent and, except where there had been modification by statute, its judgments were based on the common law of medieval times." H. BELL, *supra*, at 109.

The lack of concern by the Court of Wards for the welfare of its charges and its attentiveness to the collection of revenues led to agitation against it, FOURTH INSTITUTE **202-03, H. BELL, *supra*, c. 7, and its eventual dissolution, An Act for Taking Away the Court of Wards and Liveries, 12 Car. 2, c. 24 § 1 (1660). Besides the dissolution of the court, the agitation against it

D. Late 17th Century

In Lord Nottingham's time,[29] chancery's jurisdiction over infants expanded somewhat. There are several bills for an accounting, and we notice that the chancellor is taking care lest the guardian take advantage of his position. In *Hall v. Yates*,[30] an accounting is taken and a *reasonable* allowance is made "for the Education and Maintenance of the said Infants, and for all Money disbursed by him [the guardian] upon their Account."[31] But in *Portington v. Althrop*,[32] "no allowance ought to be made to a guardian for his pains *in managing*, for guardian by deed or will may refuse the employment if he like it not."[33]

There are also two instances of broad orders for the education of infants. In *Corcellis v. Corcellis No. 1*,[34] a widow brought a bill in chancery to be relieved of an action at law. It seems that a testamentary guardian had brought an action at law to obtain custody of the widow's infants, who were willed to his guardianship by the widow's late husband. Lord Nottingham allowed a plea that the defendant was a testamentary guardian. He also allowed the widow to reply and disprove the will, if she could. Apparently she failed to disprove the will, because in *Corsellis v. Corsellis*[*sic*] *No. 2*[35] she brought another bill, this time asserting new matters as to the testator's intentions. According to Yale, one resolution of *Corsellis No. 2* was as follows:

> Where the guardianship of the plaintiff is devised to the defendant who is also to have the lands if the plain-

produced an evident awareness of the crown's responsibility for the welfare of infants.

Cases decided by the Court of Wards may be found in LEY'S REPORTS (1659) [including A LEARNED TREATISE CONCERNING WARDS AND LIVERIES appended to the end thereof]; DYER'S REPORTS (1585); PLOWDEN'S COMMENTARIES (1578).

29. Sir Heneage Finch, afterwards Lord Nottingham, was Lord Chancellor 1673-1682. Reports of cases decided by him are collected in REPORTS *Tempore* FINCH (R.*t.* Finch) and in 1-2 D. YALE, LORD NOTTINGHAM'S CHANCERY CASES (Selden Society 1957, 1961) [hereafter cited as D.YALE]. The later also contains a thorough introduction to Lord Nottingham's life and work. A shorter piece can be found in 6 HOLDSWORTH 539-48.

30. R.*t.*Finch 2, 23 Eng. Rep. 1 (Ch. 1673).

31. *Id.* at 2, 23 Eng. Rep. at 2.

32. 2 D.YALE 476-77 (Ch. 1676-1677).

33. *Id.* at 476-77 (emphasis added). *See also* Worsop v. Edy, 1 D. YALE 205-06 (Ch. 1675); Edwards v. Jorden, R.*t.*Finch 317, 23 Eng. Rep. 173 (Ch. 1677). For text and cases on other aspects of the chancellor's control over guardians' finances, *see* 6 HOLDSWORTH 649 nn.8-12, 650 nn.1-2.

34. R.*t.*Finch 200, 23 Eng. Rep. 110 (Ch. 1674-1675). I have taken the liberty of labelling this case "No. 1" and the case noted in the text accompanying note 35 *infra* "No. 2." The "No. 2" case substitutes an "s" for the "c" in the names of the parties. Perhaps this substitution has prevented their recognition as related cases.

35. 2 D. YALE 498, R.*t.*Finch 351, 23 Eng. Rep. 192 (Ch. 1677).

> tiff die without issue, there the Court will appoint the place and manner of the infant's education.[36]

According to Reports *Tempore* Finch, one of the court's orders was as follows:

> That the Defendant shall not have the Custody of the Infant, but that he shall remain at *Eaton* till this Court give farther Direction, &c.[37]

The second instance of a broad order is found in the case of *Shaftsbury v. Hannam*.[38] The Earl of Shaftsbury claimed the guardianship of infant Hannam by deed from the infant's late father. The widow alleged,

> that the sole *Guardianship* of the Child belonged to her by the last Will of her Husband; and that the Custody always remained with her, till the *Earl of Shaftsbury*, when he was *Lord Chancellor*, sent a *Serjeant at Arms* to seise the Infant; but that she hearing her Son was brought up in the House of a *Nonconformist*, where he was both hardly used and ill cloathed, she went to see him, and finding him in an ill Condition and consumptive, she brought him away without any Force.[39]

The court held that the deed was probably revoked by the will and that it would continue the guardianship of the infant in his mother "until she should be evicted thereof by due Course of Law."[40] However, it went on to make the following additional order:

> But because it was insinuated by the Counsel for the Plaintiffs, that the *Lady Hannam* was a *Papist* (which she utterly denied), therefore unless she would dispose her self to receive the Sacrament according to the Rites of the *Church of England*, before the End of the next Term, and produce a legal Certificate thereof, the Court would then consider to remove the Infant into such Hands as might secure his *Education in the Protestant Religion*.[41]

Obviously, after this case, it can be said that if the infant is properly before the court (*i.e.*, if there is an estate issue which

36. *Id.* at 498, 23 Eng. Rep. at 192.
37. R.*t.*Finch at 353, 23 Eng. Rep. at 194.
38. R.*t.*Finch 323, 23 Eng. Rep. 177 (Ch. 1677).
39. *Id.*
40. *Id.* at 324, 23 Eng. Rep. at 177.
41. *Id.*

the chancellor has authority to adjudicate, an accounting, a relief from an action at law, etc.), the court will concern itself with the infant's care and its orders for his care may be quite broad.[42, 43]

II. THE KING AS "PARENS PATRIAE"

Traditionally, the king had certain prerogatives.[44] These first appear as rights to revenue in the so-called statute Prerogativa Regis,[45] and later appear as "powers which are vested in the crown by the laws of England . . . necessary for the support of society."[46] "Parens patriae" had traditionally been viewed as

42. Notice should be taken of Lord Nottingham's statement that "the Court would then consider to remove the Infant into such Hands as might secure his *Education*. . . ." This dictum is a broader statement of the court's right to appoint guardians than we have seen before. Previously the court had always decided the right of guardianship between competing parties. It had never given guardianship to a stranger.

43. In contradistinction to the chancellor's growing care for infants was his loss of jurisdiction over the king's wards. It has already been noted that from 1540-1660, jurisdiction over the king's wards was in the Court of Wards and Liveries. *See* note 28 *supra*. Upon the dissolution of that court, instead of returning to chancery, the wardships were discharged. The relevant part of the Act is as follows:

> And that all tenures by knights service of the King . . . and by knights service *in capite*, and by socage *in capite* of the King, and the fruits and consequents thereof, happened or which shall or may hereafter happen or arise thereupon or thereby, be taken away and discharged, and law, statute, custom or usage to the contrary hereof in anywise notwithstanding. An Act for Taking Away the Court of Wards and Liveries, 12 Car. 2, c. 24, § 1 (1660).

The result was that while the chancellor was caretaker to some infants, he was no longer guardian to others. This should have had some importance. The difference between the roles of caretaker and guardian had had significance. For example, the king was guardian to idiots. As such, he could take the profits of their lands. *Prerogativa Regis*, 17 Edw. 2, c. 9 (1324). *See* note 2 *supra*. He was caretaker to lunatics. The profits of their lands had to be applied to their maintenance and use. *Id.* at c. 10. With respect to the king's wards, he had had the rents and profits of their lands, their marriages, and the control of their bodies. The latter entailed the right "to bring him [the ward] up in such a way that he would become a worthy tenant." H. BELL, *supra* note 28, at 1. As a caretaker, the chancellor had so far worked on an *ad hoc* basis. If there were an accounting against a socage or testamentary guardian, the chancellor had ascertained that the guardian was not cheating the infant. *See* Portington v. Althrop, *supra* note 32 and accompanying text. If there were a dispute as to who should be guardian in socage, the chancellor oversaw that no one with too much financial interest became the guardian. *Cf.* Sweetman v. Edge, *supra* note 15 and accompanying text. More recently the chancellor had made at least two orders respecting infants' education. *See* Corsellis v. Corsellis No. 2, *supra* notes 36 and 37 and accompanying text; Shaftsbury v. Hannam, *supra* note 41 and accompanying text. We shall see, however, that though the distinction was sometimes made verbally, it had no significant effect upon the chancellor in his role as caretaker. Partly, this may have been due to the use of the concept "parens patriae."

44. *See* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *237 (Lewis ed. 1897); J. CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN (1820); 4 HOLDSWORTH 203-08.

45. 17 Edw. 2, cc. 1-16 (1324). *See* notes 2 and 43 *supra* and note 50 *infra*.

46. 1 W. BLACKSTONE *237.

one of these prerogatives.[47] It may be, however, that "parens patriae" was first viewed as duty owned by the crown to its subjects. It may have been devised as a restriction upon the king's prerogatives.[48] Indeed, Chitty, in 1820, defines "parens patriae" almost apologetically. He says,

> The King is in legal contemplation the guardian of his people; and in that amiable capacity is entitled, (or rather it is his Majesty's duty, in return for the allegiance paid him,) to take care of such of his subjects, as are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property.[49]

To debate whether "parens patriae" was first a power or a duty is to quibble. A more interesting question is the effect of "parens patriae" on the development of the chancellor's jurisdiction. In this section will be traced "parens patriae" before it appeared in infant cases.

Chitty's definition is a good starting point. It is too narrow, however, because "parens patriae" was not limited to those "legally unable" but included some otherwise "unable", because it was not limited to "mental incapacity" but included other incapacities, and because it was not limited to the three groups mentioned but also such other seemingly diverse elements as charities, playing-cards, parks, chases, and warrens.

A. Idiots and Lunatics.

The king's prerogatives with respect to the lands of idiots and lunatics were recognized in *Prerogativa Regis*.[50] An attempt

47. *See* J. CHITTY, *supra* note 44, at 155; J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1333 (3rd Eng. ed. 1920) [first published 1836]; 4 J. POMEROY, A TREATISE OF EQUITY JURISPRUDENCE § 1304 (5th ed. 1941) [first published 1881-1883].

48. *See* F. BAUMER, THE EARLY TUDOR THEORY OF KINGSHIP c. 6 (1966).

49. J. CHITTY, *supra* note 44, at 155.

50. The King shall have the Custody of the Lands of natural Fools taking the Profits of them without Waste or Destruction, and shall find them their Necessaries, of whose Fee soever the Lands be holden. And after the death of such Idiots he shall render it to the right Heirs, so that such Idiots shall not aliene, nor their Heirs shall be disinherited. 17 Edw. 2, c. 9 (1324), translated in 1 STATUTES AT LARGE 380 (Pickering ed. 1762).

Also the King shall provide, when any (that beforetime hath had his Wit and Memory) happen to fail of his Wit, as there are many *per lucida intervalla*, that their Lands and Tenements shall be safely kept without Waste and Destruction, and that they and their Household shall live and be maintained competently with

apparently was made, however, even in Prerogativa Regis, to limit the king's rights to the lands. The king had guardianship of natural fools, those mentally incapacitated from birth. But with respect to lunatics, those who lost their "wit" later, the king had only the unprofitable care of them. The distinction, I surmise, was made in order to prevent abuse of the prerogative, *i.e.*, in order to prevent enemies of the king from being declared lunatic and having the profits of their lands added to the king's treasury.

Fleta,[51] speaking to idiots, justifies their guardianship as being due to "their inability to rule themselves."[52] Fleta's Latin is "*se ipsos regere non nouerunt.*"[53] In speaking to why infants should be under the wardship and care of others, Fleta's reason is "*se ipsos regere non norunt.*"[54] Fleta's description of the idiot's incapacity continues as follows: "[they] being adjudged ever to be, as it were, below full age."[55] Bracton, too, speaks of infants being under the wardship and care of others because

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the Profits of the same, and the Residue besides their Sustenation shall be kept to their Use, to be delivered unto them when they come to right Mind; so that such Lands and Tenements shall in no wise be aliened; and the King shall take nothing to his own Use. And if the Party die in such Estate, then the Residue shall be distributed for his Soul by the Advice of the Ordinary. 17 Edw. 2, c. 10 (1324).

See notes 2 and 43 *supra.*

51. "The name given to an ancient treatise on the laws of England, founded mainly upon the writings of Bracton and Glanville, and supposed to have been written in the time of Edw. I. The author is unknown, but it is surmised that he was a judge or learned lawyer who was at that time confined in the Fleet prison, whence the name of the book." BLACK'S LAW DICTIONARY 768-69 (4th ed. 1957). Edward I reigned 1272-1307. Hence the book was written before the given date of *Prerogativa Regis.* However, the statute's date is said to have been earlier. *See* note 2 *supra.*

52. It is the custom to appoint guardians for the lands and persons of idiots and fools for the whole of their lives, and this has been lawful and permissible because of their inability to rule themselves, being adjudged ever to be, as it were, below full age. But because they were suffering many disinhersions by reasons of such wardships, it was provided and generally agreed that the king should have the perpetual wardship of the persons and inheritance of such idiots and fools from whatsoever lord they held their lands, provided that they were idiots and fools from birth—though not if they became so later—and that the king should marry them and preserve them from any disinhersion, with this proviso, however, that the lords of the fees and others interested should lose none of their rights, for example, to services, rents, wardships up to the age of lawful majority, according to the nature of the fees, to reliefs and such like. 1 FLETA c. 11, para. 8 (2 Selden Society ed. 21 H. Richardson and G. Sayles 1955).

53. 1 FLETA, c. 11, para. 8

54. 1 FLETA, c. 9.

55. *Id.*

"*se ipsos regere nō norūt.*"[56] Thus, as early as the thirteenth century, we see two things of interest: an early view of the king's relation to idiots as one of beneficence; a parallelism between idiots as wards and infants as wards.

Two and one-half centuries later, Fitzherbert's rationale is that the guardianship of idiots is an obligation owed to loyal subjects. The relevant passage, in translation, appears as follows:

> [T]he King by the Law of right is for to defend his Subjects, their Goods and Chattels, Lands and Tenements; and therefore in the Law every loyal Subject is taken into the Kings Protection; . . . And because that every man is within the Kings Protection, an Ideot, who cannot defend nor govern himself, nor order his Lands, Tenements, Goods, nor Chattels, the King of right ought for to have him in his custody, and to rule him, and his Lands and Tenements, Goods and Chattels; and that appeareth by the Statute of *Praerogativa Regis, cap.* 8.[57]

Fourteen years after Fitzherbert had written the above, Staunford wrote as follows:

> So it appearethe by *Bracton*, that in his tyme yt was thoughte expedient, that folke that were destraught should haue a tutour, or one that should take the charge of them, whiche office since is reuolued onto the kinge, and made parcell of his prerogatiue. For as *Fitzherbert* in his *Natura breuim* folio 232 very well saithe. The kinge is the protectour of all his subiectes, and of al theire goodes, landes, and tenements, and therefore of suche as cannot gouerne them selues, nor order their lands & tenements, his grace (as a father) muste take uppon him to prouide for them, that they them selues and their things maye be preserued.[58]

By Staunford's time, the guardianship had become something the king "muste take uppon him to prouide for them, that they them selues and their things maye be preserued."[59] Staunford's rationale looks very much like Prerogativa Regis' rationale

56. H. BRACTON, *supra* note 13 at n.86a.
57. A. FITZHERBERT, DE NATURA BREVIUM 232 (1666) [first published 1534?].
58. W. STAUNFORD, AN EXPOSITION OF THE KINGS PREROGATIUE 37a (1573) [first written 1548; first published 1568].
59. *Id.*

for the care of lunatics, namely "that they and their Household shall live and be maintained competently . . . so that such Lands and Tenements shall in no wise be aliened."[60]

Staunford's merging of the two classes, idiots and lunatics, apparently reflects the practice of his day.[61] Bell tells us that "custody crept into grants of lunatics."[62] And the custody of both idiots and lunatics "were sued for and obtained in much the same fashion as the wardship of heirs."[63] Though custody of lunatics was given, it seems that both idiots and lunatics were treated as objects for care rather than as sources for revenue. Bell tells us that the conditions upon which custody of an idiot could be gotten began to parallel those of a lunatic "in one important way . . . namely that he [the guardian] should account for any surplus of the rents and profits."[64] "More important perhaps, it is pretty clear that no great effort was made by the crown to turn it [wardship] to profit; nor was the committee [to whom the guardianship was given] allowed to do so."[65]

While merging the two classes (idiots and lunatics) and placing their guardianship upon a duty of care, Staunford also describes the king as acting "as a father."[66] This is the first time that the author knows that the king's relation to his wards is called a "father" relation. Since Staunford used the YearBooks a good deal for his work,[67] it may be that the expression "as a father" can be found there. But it is significant that the expression was used with reference to the king's wards when the king's duty to them was said to be one of care.

Coke, whose Second Institute[68] was first published in 1641,[69] while explaining the statute Magna Charta,[70] discusses whether the king's prerogative as to the lands of idiots existed at the time of that statute. In this discussion, the following passage appears:

60. *See* note 50 *supra.*
61. *See* H. BELL, *supra* note 28, at 129-30.
62. *Id.* at 129.
63. *Id.*
64. *Id.* at 130.
65. *Id.*
66. *See* note 58 *supra.*
67. *See* Staunford's preface to W. STAUNFORD, *supra* note 58. It is also interesting that the earliest general use of the "father" concept with respect to the king that I have found is in ERASMUS, INSTITUTIO PRINCIPIS CHRISTIANI (1516) ("paterfamilias"), taken from F. BAUMER, *supra* note 48, at 196.
68. E. COKE, SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1809 ed.) [Hereinafter cited as SECOND INSTITUTE].
69. *See* 5 HOLDSWORTH 466.
70. 9 H. 3, before c. 1 (1225).

> And idiots from their nativity were accounted alwayes within age, and therefore the custodie of them was perpetuall. And the lord of whom the land was holden, had not a tenant that was able to doe him service. And therefore within the reason of a custodie of a minor or of an heire within age in case of wardship.[71]

The passage indicates that the parallelism between infants and idiots had continued into Coke's day. This parallelism may account somewhat for the mistake found[72] in Coke's Reports, in the report of *Beverley's Case.*[73] *Beverley's Case* concerned a defense of *non compos mentis* to an obligation upon a bond. During the course of the report, Prerogativa Regis is discussed. Part of that discussion, as it appeared in the 1826 edition, is as follows:

> And that the King shall have the protection of the goods and chattels of an idiot, as well as of his lands, appears by F.N.B. [Fitzherbert's Natura Brevium] 232b. where he says, that if an idiot who cannot defend or govern himself, nor order his lands, tenements, goods, and chattels, the King of right ought to have him in his custody, and to protect him and his lands, goods, and chattels.[74]

However, when first published the passage erroneously appeared as follows:

> Et q le Roy auer ptection del biens & chateux dun *enfant* cibiẽ cõe de son terr, appiert p *Fitz.Na.Br.232b.* ou il dit q un Ideot q ne poyt soy defẽder ou goũner, ne order sez tres tenemts biẽs ne chateux, le roy de droit couiet luy auer en son custody, & a ptecter luy et ses tres biens & chateux.[75]

Similar errors can be found in the French editions of 1618 and 1697. The English translations contain *two* errors. In the 1658 and 1680 English editions, "infant" is twice substituted for "idiot" in the above passage.[76]

71. SECOND INSTITUTE *14.
72. The mistakes in the 1610 and 1658 editions of 4 COKE'S REPORTS were found by Lawrence B. Custer of Marietta, Georgia (LL.B., U.Pa. 1960), and were noted in Professor Foote's materials for the Family Law course at the University of Pennsylvania Law School 3A-5 (unpublished). *See* FOOTE, LEVY, AND SANDER, CASES AND MATERIALS ON FAMILY LAW 394 n.13 (1966).
73. 4 Coke's Rep. 123b, 76 Eng. Rep. 1118 (K.B. 1603).
74. 4 Coke's Rep. at 126b (Thomas and Fraser ed 1826).
75. 4 Coke's Rep. at 126b (Stationers ed. 1610) [emphasis added].
76. The five editions published in the seventeenth century are in the Biddle Law Library at the University of Pennsylvania. The 1826 edition is in the rare book room.

Thus, we can conclude that in the seventeenth century the king's relation to idiots and lunatics was that of guardian to ward, that the guardianship was a duty of care rather than a source of profit, and that the duty had at least once been described as that of a "father."

The *chancellor's* jurisdiction over idiots and lunatics is explained as follows by Holdsworth:

> Jurisdiction over those of unsound mind [idiots], being regarded in early times as a valuable right, was vested originally in the Exchequer. As it came to be regarded in the light of a duty it passed to the Chancellor . . . . This delegation might equally well have been made to any other great officer of state; and, while the Court of Wards (1539-1660) was in existence, the jurisdiction was generally exercised by it. The fact that after 1660 the delegation was almost always made to the Chancellor, is due, partly to his position as a great officer of state, responsible for the issue of the commission [to inquire into alleged insanity], partly to his position as the leading member of the Council. It was to the Council that a person of unsound mind so found by inquisition could originally appeal; and from the Chancellor it was to the Council and not to the House of Lords that lunacy appeals originally lay.[77]

B. Charities

The origins of chancery's jurisdiction over charities lie in sixteenth and early seventeenth century poor law.[78] The poor law is said to have had several aims, including to provide work for those able-bodied and willing, and to coerce, by the machinery of the criminal law, those able-bodied and unwilling.[79] However, it is in a third aim of the poor law we are interested, namely the support and maintenance of those *not* able bodied, the so-called *impotent* poor.

With reference to this third class, much legislation had been passed over the years, including public collection of alms,[80] special license to beg,[81] relief in hospitals,[82] supervision of

77. 1 HOLDSWORTH 474-75.
78. *See generally* 4 HOLDSWORTH 387-402; E. LEONARD, THE EARLY HISTORY OF ENGLISH POOR RELIEF (1965 ed.).
79. 4 HOLDSWORTH 392.
80. 27 H. 8, c. 25 (1535).
81. 2 & 3 Phil. and M. c. 5, § 7 (1555); 5 Eliz. c. 3, § 10 (1562); 14 Eliz. c. 5, § 40 (1572).
82. *Id.* § 8.

charitable foundations by bishops and justices.[83] "[T]he assumption by the state of the burden of providing for the poor and impotent . . . led it to interest itself in the administration of public charitable trusts."[84] In 1601, An Act to Redress the Misemployment of Lands, Goods and Stocks of Money Heretofore Given to Certain Charitable Uses was passed.[85] As its title indicates, its purpose was to remedy the misappropriation of funds "by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same."[86] By this Act, the chancellor was empowered to award commissions to bishops and others of good standing authorizing them to enquire into the application of the revenues of charitable foundations. The commissioners could make orders, reviewable by the chancellor. "[T]he Act enabled the Chancellor to intervene effectively to suppress breaches of trust."[87]

"[O]ther provisions of the Act were so interpreted that he [the chancellor] was able to give effect to many charitable gifts in spite of defects which would have been fatal to the validity of any other gift."[88] Thus, the chancellor saved from invalidity charitable trusts that would otherwise have been void for indefiniteness. For example, in *Champion v. Smith*,[89] one Ridley devised lands "that the parson and churchwardens in Thames street, London, and four honest men of that parish, should sell the land, and employ the money for the poor and charitable uses in that parish."[90] The chancellor held that the devise was not void because of indefiniteness. Similarly, the chancellor held good a bequest of "monies to a charitable use, to be bestowed for poor people."[91]

In 1670, *Palmer v. Newman*[92] came before the Lord Keeper.[93] A testator had devised all his lands and goods to be sold and applied for the maintenance of the scholars of Trinity College in Cambridge subject to the following limitation: "That if any by

83. *Id.* §§ 32, 37.
84. 4 HOLDSWORTH 399.
85. 43 Eliz. c. 4 (1601).
86. *Id.*
87. 4 HOLDSWORTH 399.
88. *Id.*
89. Tothill 30, 21 Eng. Rep. 114 (Ch. 1605-1606).
90. *Id.* at 31, 21 Eng. Rep. at 114.
91. Mayor of Bristol v. Whitton, Tothill 33, 21 Eng. Rep. 115 (Ch. 1633-1634). *See also* Attorney General v. Syderfen, 1 Vern. 224, 23 Eng. Rep. 430 (Ch. 1683) (devise to such charity as testator had in writing appointed; no writing having been found, the king appointed one).
92. 1 Ch. Ca. 157, 22 Eng. Rep. 741 (Ch. 1670).
93. Sir Orlando Bridgman.

Cavillation concerning the Law of Maintenance should go about to hinder this Bequest, or if any of his Bequest might not be suffered to go to the College, then the Defendant [in *Palmer v. Newmen*] should enjoy all his Lands, Goods, &c."[94] It was alleged that the defendant "raiseth Cavils to defeat the Charity."[95] The attorney general had brought suit in behalf of the king. The Lord Keeper was of the opinion that the suit should probably[96] have been brought by a commission appointed by the court. He thought the suit fell within "the *Statute* of 30 *Eliz.*"[97] [43 Eliz.?[98]]. But in speaking to suits not within the statute, the Lord Keeper said that "the King as *Pater Patriae* may inform for any Publick Benefit for Charitable Uses."[99]

Five years later, in *Jones v. Peacock*,[100] Lord Nottingham had to decide whether a bequest of a charitable trust was void for indefiniteness. In the course of the case it again was asked who should have brought the suit. Lord Nottingham answered as follows:

> To which I said the case was never in a proper course until now, for the King as *Pater patriae* may and ought to be the great protector of all charities which were not within the regulation of 43 Eliz., for he was so at Common Law before the statute, and the consent of executors or heirs to the diverting of the charity is not material, for though the charity be in itself uncertain to what poor it should belong, yet the King by his prerogative may make the application to such of his poor subjects as he please.[101]

Thus, by the end of the seventeenth century the chancellor viewed himself as giving fatherly protection to all charities. This role was readily accepted by the textwriters.[102, 103]

94. 1 Ch. Ca. at 157, 22 Eng. Rep. at 741.
95. *Id.* at 158, 22 Eng. Rep. at 741.
96. There was a consent degree despite the court's opinion.
97. 1 Ch. Ca. at 158, 22 Eng. Rep. at 741.
98. *See* note 85 *supra* and accompanying text.
99. 1 Ch. Ca. at 158, 22 Eng. Rep. at 741. It is interesting to note that 1 CHANCERY CASES was first published in 1697. The first known use of "pater patriae" in an infant case was in 1697. *See* note 124 *infra*.
100. 1 D. YALE 209, R.*t.*Finch 245, 23 Eng. Rep. 135 (Ch. 1675).
101. 1 D. YALE at 209. This does not appear in R.*t.*Finch.
102. *See* H. BALLOW, A TREATISE OF EQUITY 456-58 (Fonblanque and Laussat notes 1835) [first published 1737?] "The king, as *parens patriae*, has the general superintendence of all *charities*; which he exercises by the keeper of his conscience, the chancellor." 3 W. BLACKSTONE *427 (1768).
103. Lord Nottingham referred to the king as "pater patriae" in a speech, March 1664, in Parliament in support of a bill repealing the statute for Triennial Parliaments, 16 Car. 1, c. 1, by 16 Car. 2, c. 1 (1664). 2 D. YALE 958.

C. Playing-cards, Parks, Chases, and Warrens

"Parens patriae" was used in connection with playing-cards and parks, chases and warrens in *The Case of Monopolies* (*Darcy v. Allein*).[104] Darcy had brought suit against Allein for infringement of his exclusive patent to import playing-cards. Coke himself was one of Darcy's counsel. One argument for plaintiff appears as follows in Coke's Reports:

> 1. Because the said playing cards were not any merchandize, or thing concerning trade of any necessary use, but things of vanity, and the occasion of loss of time, and decrease of the substance of many, the loss of the service and work of servants, causes of want, which is the mother of woe and destruction, and therefore it belongs to the Queen (who is *parens patriae, et paterfamilias totius regni*, . . .) to take away the great abuse, and to take order for the moderate and convenient use of them. 2. In matters of recreation and pleasure, the Queen has a prerogative given her by the law to take such order for such moderate use of them as seems good to her. 3. The Queen, in regard to the great abuse of them, and of the cheat put upon her subjects by reason of them, might utterly suppress them, and by consequence without injury done to any one, might moderate and tolerate them at her pleasure. And the reason of the law which gives the King these prerogatives in matters of recreation and pleasure was, because the greatest part of mankind are inclinable to exceed in them; and upon these grounds divers cases were put, *sc.* that no subject can make a park, chace [sic], or warren within his own land, for his recreation or pleasure, without the King's grant or license.[105]

Despite the argument, Darcy lost his suit.

The proffered rationale for the prerogative as to parks, chases, and warrens was rejected.[106] Hence the analogy was of no help to Darcy. Despite the rejection, Coke later repeated the rationale, this time declaratively, in his Second Institute:

> [T]he common law gave no way to matters of pleasure (wherein most men do exceed) for that they brought no profit to the common-wealth; and therefore it is not

104. 11 Coke's Rep. 84b, 77 Eng. Rep. 1260 (K.B. 1602).
105. *Id.* at 85b-86a, 77 Eng. Rep. at 1261-62.
106. *Id.* at 87b, 77 Eng. Rep. at 1264.

> lawfull for any man to erect a park, chase, or warren, without a license under the great seale of the king, who is *pater patriae*, and the head of the commonwealth.[107]

On the other hand, the characterization of the Queen as having the prerogative "to take away the great abuse" "in matters of recreation and pleasure" was not disputed. Rather, it was said,

> [t]he Queen was deceived in her grant; for the Queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public.[108]

Thus, while the prerogative "to take away the great abuse" "in matters of recreation and pleasure" was sustained, the Queen's prerogative to grant letters patent[109] was set back, a prelude to the Statute of Monopolies.[110, 111]

Coke's argument was that card-playing, and parks, chases, and warrens were subverting influences and that it was the king's duty to protect his subjects from them by controlling their dissemination. This is not far from the king's duty to protect those that cannot govern themselves and those that are impotent. In fact, all of the classes of things to which "parens patriae" eventually became attached can be grouped together as classes that need protection lest things beyond their control overcome them, *i.e.*, classes that need some kind of paternal protection and care. The author believes that idiots and lunatics and the impotent poor (charities) were singled out as classes deserving of special care. No doubt "parens patriae" was used to legitimate that special care. The attempt by Coke to legitimate the king's prerogative to grant letters patent did not find acceptance with the court. "Parens patriae" was never used to legitimate an interest of the king. Rather it was used to legitimate interests of the needy. Hence the concept was available to support an argument to give special care to infants.

107. SECOND INSTITUTE *199. "Coke"'s argument in *Darcy* was in 1602. His report of the case was first published in 1615. His statement in SECOND INSTITUTE was first published in 1641.

108. 11 Coke's Rep. at 87a, 77 Eng. Rep. at 1264.

109. *See generally* Hulme, *The History of the Patent System Under the Prerogative and at Common Law,* 12 LAW Q. REV. 141 (1896).

110. 21 Jac. 1, c. 3 (1623).

111. As noted in the text, *Darcy* was an attack upon the king's prerogative in granting letters patent. It did not attack his role as "parens patriae." Eight years later (1610), in a speech to Parliament, King James I referred to himself as "parens patriae." P. HUGHES AND R. FRIES, CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND 167 (1959).

III. The Appearance of "Parens Patriae" in Infant Cases

A. Falkland v. Bertie[112]

The first mention of "parens patriae" ("pater patriae" in fact) in an infant case is in *Falkland v. Bertie.* A Mr. Carie had devised land in trust for Mrs. Willoughby for life if within three years after the testator's death she married Lord Guilford, and then to the eldest and other sons of Mrs. Willoughby by Lord Guilford in tail male, but if she did not marry Lord Guilford within three years, then to Lord Falkland for life, and then to his first and other sons in tail male. At the time of the testator's death, Mrs. Willoughby, Lord Guilford, and Lord Falkland were infants. Mrs. Willoughby proposed an ante-nuptial settlement to Lord Guilford's guardians. But agreement was never reached. More than three years after the testator's death, Lord Falkland brought a bill for an accounting. Mrs. Willoughby, who had married a Mr. Bertie after three years had passed, also brought a bill for an accounting. Mrs. Willoughby argued that since Lord Guilford's guardians had not acceded to her proposals as they should have, she had been unable to meet the condition to her taking the life estate.[113] Since chancery favored infants, it should have permitted Mrs. Willoughby to take her estate, failure to meet the condition notwithstanding. According to the report in 2 Vernon's Reports, Lord Somers answered the argument as follows:

> And as to the Plea of Infancy, it is true Infants are always favoured. In this Court there were several Things that belonged to the *King* as *Pater patriae*, and fell under the Care and Direction of this Court, as Charities, Infants, Idiots, Lunaticks, *&c.* afterwards such of them as were of Profit and Advantage to the King were removed to the *Court of Wards*[114] by the Statute; but upon the Dissolution of that Court, came back again to the Chancery, where the Interests of Infants is so far regarded and taken Care of, that no Decree shall be made against an Infant, without having

112. 2 Vern. 333, 23 Eng. Rep. 814 (Ch. 1696); also reported *sub nom.* Bertie (Berty) v. Fa(u)lkland, 3 Ch. Ca. 129, 22 Eng. Rep. 1008 (Ch. 1698), 2 Freem. 220, 22 Eng. Rep. 1171 (Ch. 1697), 1 Eq.Ca.Ab. 110, 21 Eng. Rep. 917 (Ch. 1696-1698), 12 Mod. 182, 88 Eng. Rep. 1248 (Ch. 1697), 1 Salk. 231, 91 Eng. Rep. 205 (Ch. 1696-1698); *rev'd* Colles 10, 1 Eng. Rep. 155 (H.L. 1697-1698.

113. There is also some hint that Lord Guilford's guardians made unreasonable counter-proposals.

114. *See* note 28 *supra.*

> a Day given him to show Cause after he comes of Age. An Infant may by his *Prochein Amy*[115] call his Guardian to an Account, even during his Minority; If a Stranger enters and receives the Profits of an Infant's Estate, he shall in the Consideration of this Court, he looked upon as a Trustee for the Infant, and the like. But the Court never pretended to change the Nature of Infants Estate, or to make *that* absolute, which was defeasible. Where an Estate is given to an Infant upon a Condition, such Act as an Infant can perform, must be done by him; and Infancy in such Case is no Excuse; and so it was held in that Case of *Fry* and *Porter*, which has been cited.[116]

There may be some doubt as to the authenticity of Lord Somers' reference to "pater patriae." The doubt originates in the fact that only 2 Vernon's report of the case has Lord Somers using "pater patriae." The other reports do not. In particular, Chancery Cases gives Lord Somers' answer to Mrs. Willougby's argument in some detail but omits "pater patriae."[117] Chancery

115. "And the King by his Letters Patents may make a general Gardian for an Infant to answer for him in all Actions or Suits brought or to be brought in all manner of Courts . . . And the Infant shall have a Writ in the Chancery for to remove his Gardian directed unto the Justices, and for to receive another, &c. and the Court at their discretion may remove the Guardian, and appoint another Gardian." A. FITZHERBERT, *supra* note 57, at 27. Blackstone misread Fitzherbert and used him as authority for chancery's *general* jurisdiction over infants, instead of Fitzherbert's limited concern with the appointment of guardians *ad litem*. "Upon the abolition of the court of wards, the care, which the crown was bound to take as guardian of its infant tenants was totally extinguished in every feodal view; but resulted to the king in his court of chancery, together with the general protection (n.c.-Fitzherbert, Natura Brevium 27) of all other *infants* in the kingdom. When therefore a fatherless child has no other guardian, the court of chancery hath a right to appoint one: and, from all proceedings thereto, an appeal lies to the house of lords." 3 BLACKSTONE, **426-27. "The *fourth* kind of guardian, not yet enumerated, is the guardian *ad litem*. But of this *special* guardian it may suffice for the present purpose to observe that the power of appointing such is incident to all courts; and that the king *may*, as it is said, by letters patent appoint a guardian to prosecute or defend for an infant in suits generally, though such appointments have been long out of use." Co. LITT. 88b n.16.

116. 2 Vern. at 342-43, 23 Eng. Rep. at 818.

117. "Infancy can be no Excuse for the Non-performance of the Condition, because it is plain the Condition was to be performed when an Infant, or else it could never have been performed. In *Fry* and *Porter's* Case, the Lady was an Infant, and is a harder Case than this, because there was no notice of the Will at all: But where an Infant is bound to perform a Condition, he is bound to it as strictly as other Persons of full Age . . . . Then the last thing to be considered in the Case, was, how far the Proceedings in *Chancery* might influence it. It was urged, that several Orders had been made in this Court in Opposition to the Proposals of the Guardians of the Lord *Guilford* by the Lord Chancellor *Jefferies;* That no Marriage should be had, unless a Compliance was first

Cases' report of the case was first published in 1702, five or six years after it was decided.[118] Two Vernon's was first published in 1728.[119] Mere proximity to the date of the case is not that crucial, since some reporters may be more complete than others. What is troubling, however, is that William Peere Williams, who edited 2 Vernon's, also reported *Eyre v. Shaftsbury*.[120] The *Eyre* court referred to the king as "pater patriae"[121] four years before 2 Vernon's was published. Of course, we do not know whether the *Eyre* court in fact referred to the king as "pater patriae." *Eyre* was reported in 2 Peere Williams in 1740.[122] We also do not know what manuscripts of *Falkland v. Bertie* were extant when *Eyre* was decided.[123] Moreover, we have no substantial

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made to the Lady's Offers; that the Will directs the Account to be taken in *Chancery;* and that this Court hath the care and ordering of Infants. To which it was answered, That true it was, that several things were trusted with this Court; It hath Jurisdiction of Infants, Idiots, and Charitable Uses. Several Statutes have altered matters in the Power of this Court, and so far they are alter'd, and no farther. The Courts of Wards and Livery, with respect to Infants and Idiots, were taken out of this Court, and transferr'd in some measure to that; but by the Dissolution of that Court, returns to this again: That Guardians are appointed by Writ for Infants, and one or more Guardians jointly: That the Law is favourable to Infants; no Decree of this Court shall be had against them, but what they may shew Cause against when they Come of Age. This Court will make Strangers accountable to Infants, in case they take the Profits of their Estate; and tho' a particular Person be appointed to take an Account, this Court can direct it shall be taken before the Court. This Court, upon Application made to it by Guardians, hath settled the Maintenance of Infants; but in case of Infants, this Court would never dispense with a Condition Precedent, or take away the Right of one Infant (as the Lord *Falkland* was) and give it to another, or can it ever bind those Persons that were never Parties to the Suit." 3 Ch. Ca. at 135-36, 22 Eng. Rep. at 1012-13.

118. The traditional citation to Bertie v. Falkland in CHANCERY CASES is 3 Ch. Ca. 129. *See* note 112 *supra*. 3 CHANCERY CASES was first published in 1745. However, 3 CHANCERY CASES was first published as SELECT CASES and appendixed to 2 CHANCERY CASES in 1702. An original folio is in the Biddle Law Library. *Cf.* J. WALLACE, THE REPORTERS 481-82 n.4 (4th ed. 1882) [hereinafter cited as J. WALLACE]; 6 HOLDSWORTH 617.

119. Holdsworth mentions that the Vernon manuscript was the subject of a dispute following Vernon's death. "Eventually it was decided that the cases should be printed under the direction of the court, and in 1726-1728 two volumes appeared, edited by Peere Williams and Melmoth. But it is probable that the author did not intend his manuscript to be printed; and the editors performed their work carelessly." 6 HOLDSWORTH 618. 2 VERNON'S REPORTS was published in 1728. An original folio is in the Biddle Law Library.

120. 2 P. Wms. 102, 24 Eng. Rep. 659 (Ch. 1722-1724); also reported *sub nom.* Shaftsbury v. Shaftsbury, Gilb. Eq. 172, 25 Eng. Rep. 121 (Ch. 1725); later published in the United States, 3 F. WHITE & O. TUDOR, A SELECTION OF LEADING CASES IN EQUITY *538 (3rd Am. ed. Hare and Wallace 1859).

121. 2 P. Wms. at 118, 24 Eng. Rep. at 164. *See* note 149 *infra*.

122. J. WALLACE, 501

123. *See* J. WALLACE, 626-27.

motive for Peere Williams to insert "pater patriae" in his editing of 2 Vernon's.[124] What is important is that subsequent cases relied upon Lord Somers' reference.

Assuming Lord Somers' reference to "pater patriae"[125] is authentic, we see the curious way in which the expression first was used with respect to infants. The curiosity, of course, is the reference to it in a case concerned with a condition precedent rather than in a case concerned with guardianship or accounting. Perhaps counsel's motivation was to prevent Mrs. Willoughby, the infant, from being prejudiced by the unreasonable acts of Lord Guilford's guardians. Since the chancellor had protected infants from their own guardians, he should protect Mrs. Willoughby the infant from another infant's guardian. It is more likely, however, that Mrs. Willoughby's counsel was trying to make the record as sympathetic as possible.[126] A year or two earlier, in *Reeve v. Long*,[127] King's Bench had held that an infant not born, though in gestation, at the termination of the preceding estate, lost his contingent remainder. The House of Lords reversed. It is quite possible that counsel believed the chancellor, already favoring infants, would follow suit. There would, at least, be a good record for review by the House. Counsel lost in chancery. But the House reversed.[128] Mrs. Willoughby got her life estate.

B. The Grand Opinion [129]

In 1717, King George I called together "all of the judges of England" to answer the question "whether the education and the care" of his grandchildren were his by right.[130] Ten judges

124. Other than the normative power of the actual.

125. Recall that 1 CHANCERY CASES, in which the first known reference to "pater patriae" in a charities case, was published the same year as Falkland v. Bertie. *See* note 99 *supra*.

126. *See* Beven, *The Appellate Jurisdiction of the House of Lords. II*, 17 LAW Q. REV. 357 (1901); 1 HOLDSWORTH 376.

127. 3 Lev. 408, 83 Eng. Rep. 754 (K.B., H.L. 1695), 1 Salk. 227, 91 Eng. Rep. 202 (K.B. 1695).

128. Colles 10, 1 Eng. Rep. 155 (H.L. 1697-1698).

129. Fortes. 401, 92 Eng. Rep. 909 (1717).

130. Whether the Education, and the Care of the Persons of his Majesty's Gradchildren, now in *England*, and of Prince *Frederick*, eldest Son of his Royal Highness the Prince of *Wales*, when his Majesty shall think fit to cause him to come into *England*, and the ordering the Place of their Abode, and appointing their Governors, Governesses and other Instructors, Attendants and Servants, and the Care and Approbation of their Marriages, wh grown up, do below of Right to his Majesty, as King of this Realm or not? *Id.* at 402, 92 Eng. Rep. at 910.

wrote opinions favoring the king. Two dissented. Of the ten favoring the king, four referred to him as "father" in some manner.[131] These references may have had some impact on the

131. During the course of Baron Fortescue's opinion favoring the king, he said the following:

> Now the King as he is *Parens Patriae*, he is also *Parens Nepotum*, Parent of his Grandchildren. *Id.* at 412, 92 Eng. Rep. at 914.
>
> And as this is a Prerogative vested in the Crown, in the Reason of the Law, and Nature of a Monarchy; so in all Ages the Crown has practised, and been in possession of this Right." *Id.* at 413, 92 Eng. Rep. at 915.
>
> But to suppose for once an unreasonable Thing, and what will never happen, that there should be contradictory Commands [by the king and his son to the king's grandchildren], the publick Good must be preferr'd, and Duty to Parents must be always subject to the Safety of the whole Community, and the King who is *Parens Patriae*, as well as *Parens Nepotis*, must be obeyed, to whom there is a double Obligation, by Nature and by Allegiance, *i.e.* by the Law of God and Law of Man. *Id.* at 423, 92 Eng. Rep. at 919.

Baron Montague's opinion favoring the king began as follows:

> I do not know that I ever was or could be of any other Opinion than for the King in this Case; what gave me the first Impression was the Government and Discipline among the Patriarchs, who educated and governed all the Grandchildren and Great Grandchildren under them.
>
> In the Patent for the sole making of Cards, the King is called *Parens Patriae & Custos Regni, & Pater Familias totius Regni. Id.* at 424, 92 Eng. Rep. at 919.

Justice Dormer's opinion favoring the king included the following:

> [T]he King has a legal Right to this Prerogative; the King is *Pater Patriae*, and his Grandchildren are the Children of the Kingdom, and of the Publick. *Id.* at 428, 92 Eng. Rep. at 921.

Justice Powis' opinion favoring the king included the following:

> To give the Children of the King Education and to breed them up for Kings is a necessary Prerogative, and particularly, to see them brought up in the Protestant Religion, and to reform their Morals, and to learn the Constitution, and how to Govern. The King is the fittest and only Person to breed them up with the Love of their King and Country, and he is the Head of the Family, and he is most able to do it, because he is assisted with the Pockets of his Subjects. *Id.* at 431-32, 92 Eng. Rep. at 922.

In connection with the first paragraph of Baron Montague's opinion, *see* R. FILMER, PATRIARCHA OR THE NATURAL POWER OF KINGS (1680). Filmer's theory of the divine right of kings was partly supported by analogy to the biblical patriarchs. "As long as the first Fathers of Families lived, the name of *Patriarchs* did aptly belong unto them; but after a few Descents, when the true Fatherhood it self was extinct, and only the Right of the Father descends to the true Heir, then the Title of *Prince* or *King* was more *Significant*, to express the Power of him who succeeds only to the Right of that Fatherhood which his Ancestors did *Naturally* enjoy; by this means it comes to pass, that many a Child, by succeeding a King, hath the Right of a Father over many a Gray-headed Multitude, and hath the Title of *Pater Patriae*." *Id.* at 20. "Although Filmer was taken up by the Royalist groups of England it is doubtful that more than a few gave serious consideration to the historical evidences of the virtue of monarchy he set down in the *Patriarcha*. The real significance of that work was in its appeal as a propaganda device, for it had a marked effect on popular thought. The best evidence of Filmer's importance in his own day is to be found in the fact that John Locke dedicated the first of his two treatises on government to the end of denying Filmer's ideas." P. HUGHES AND R. FRIES, *supra* note 111, at 286. John Locke published his treatises in 1690. *See* also 6 HOLDSWORTH 276 *et seq.*

cases noted hereafter because they combined "education and care" of infants with the king's role as "father." They reflect, perhaps, some contemporary thinking.

Of the two dissenters, one was Justice Eyre.[132] As will be noted below, five years after *The Grand Opinion*, counsel attempted to make use of the king's "parens patriae" prerogative *against* Justice Eyre. Whether the two events are related is open for speculation.

C. The Duke of Beaufort v. Berty[133]

The Duke of Beaufort appointed Mr. Berty and Mr. Grevill testamentary guardians for his two sons, the younger of whom was Lord Noel. After the Duke's death, the guardians sent Lord Noel to Westminster School. Lord Noel's relatives thought Eaton a more fitting place and petitioned the chancellor to send the infant there.

William Peere Williams,[134] who represented the guardians, argued the issue of the court's jurisdiction poorly. There was no dispute as to guardianship, nor an accounting to be made by the guardians. Nor was there an action at law to be relieved from. Despite this, Peere Williams argued that if the two guardians had disagreed as to the ward's education, then

> it was reasonable that the Great Seal, which has a Superintendency over all Infants, should interpose; else there would be a Failure in the due Education of the Infant; but when both the Guardians had agreed that *Westminster* School was the properest School for Lord *Noel*, it was hoped the Court would not send him to *Eaton*.[135]

Furthermore,

> It was admitted, that in Case the Guardians should misbehave, the Court might interpose, upon a Presumption,

132. Eyre said in part:
> [T]he Question is, Whether the King has a legal Right to dispose of the Marriage and Education of his Grandchildren, exclusive of the Father? The Inconveniences are above me to expatiate upon; but if any Thing be amiss, the Legislature will set it right. No authority has been produced out of any of our Law Books, no Guardianship by the Prerogative has yet been proved; the Lord Chief Justice *Coke* says nothing of this Prerogative, he would tell us surely when these Prerogatives began, and where they ended. Fortes. at 426, 92 Eng. Rep. at 920.

133. 1 P. Wms. 702, 24 Eng. Rep. 579 (Ch. 1721).
134. *See* text at note 119 *supra*.
135. 1 P. Wms. at 703-04, 24 Eng. Rep. at 579.

> that the Testator himself would not have instructed the Guardians with this Power, had he foreseen they would have abused it.[136]

Thus, it was admitted that chancery could interfere whenever any testamentary guardian misbehaved.

Lord Macclesfield evidently felt some uneasiness about the admissions and sought to justify his jurisdiction.

> Lord *Macclesfield*, with some Warmth said, that the Guardians were but Trustees, and that the Statute,[137] by enabling the Father to devise the Guardianship of his Children, did no more than impower the Father by Will to chuse a different Person from him or her that would have been Guardian in Socage; a different Person than what the Law would have appointed, . . . But that still a Guardian appointed according to the Statute, had no more Power than a Guardian in Socage; and as the Court could interpose where there was a Guardian in Socage, so might it also do in a Case of a Guardian by the Statute, both being equally Trustees . . . and as the Court would interpose, where the Estate of a Man was devised in Trust, so would it *a fortiori* concern it self, on the Custody of a Child's being devised to a Guardian, who was but a Person *intrusted* in that Case, since nothing could be of greater Concern than the Education of Infants.[138]

The notion that guardians were trustees, despite the lack of financial interest, was an appealing notion. An alleged breach of trust would then warrant court interference.

The chancellor widened the court's power to interfere against guardians further.

> Likewise in Answer to the Objection that the Court should not interpose until the Guardians misbehaved; *His Lordship* observed, that *preventing Justice* was to be preferred to *punishing Justice*; and that he ought rather to prevent the Mischief and Misbehaviour of Guardians, than to punish it when done. That if any

136. 1 P. Wms. at 704, 24 Eng. Rep. at 579.
137. *See* note 10 *supra*.
138. *Id.* at 704-05, 24 Eng. Rep. at 579. Recall that a guardian in socage was someone to whom the estate could not descend. *Quaere* whether the court would interfere, except for an accounting, where the guardian had no financial interest. *See* note 13 *supra* and accompanying text.

> wrong Steps had been taken which might not deserve Punishment, yet if they were such as induced the least Suspicion of the Infant's being like to suffer by the Conduct of the Guardians, (as there were in this Case) or if the Guardians chose to make Use of Methods that might turn to the Prejudice of the Infant, the Court would interpose, and order the Contrary; and that this was grounded upon the general Power and Jurisdiction which it had over all Trusts, and a Guardianship was most plainly a Trust.[139]

The court left Lord Noel at Westminster since he had made considerable progress there. It warned that it would remove him and send him to Eaton should he not behave well.

D. Eyre v. The Countess of Shaftsbury[140]

Justice Eyre (who dissented in *The Grand Opinion*) was the testamentary guardian of the infant Earl of Shaftsbury.[141] In 1722, Justice Eyre,

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139. *Id.* at 705, 24 Eng. Rep. at 580. *See In re* Baby Girl Turner, 12 Ohio Misc. 171, 229 N.E.2d 764 (C.P. 1967) (child taken away from mother at birth; the Chancellor's "the Infant's being like to suffer by the Conduct of the Guardians"?); *cf.* State v. Larson, 240 Ore. 474, 402 P.2d 239 (1965) ("French kissing" may contribute to the delinquency of a minor; the Chancellor's "Use of Methods that might turn to the Prejudice of the Infant"?).

140. 2 P. Wms. 102, 24 Eng. Rep. 659 (Ch. 1722); also reported *sub nom.* Shaftsbury v. Shaftsbury, Gilb. Eq. 172, 25 Eng. Rep. 121 (Ch. 1725); later published in the United States, 3 F. WHITE & O. TUDOR, A SELECTION OF LEADING CASE IN EQUITY *538 (3rd Am. ed. Hare and Wallace 1859). Original folios of PEERE WILLIAMS AND GILBERT'S CASES IN EQUITY are in the Biddle Law Library. With reference to GILBERTS, Wallace has said; "The volume is one of no kind of weight, and when cited by Sergeant Wynne (22d June, 1737, in the Common Pleas), 'the court exploded the book, and told the Sergeant they hoped he would quote cases from some better authority.'" J. WALLACE 502.

141. The infant earl was evidently the great-grandson of the first Earl of Shaftesbury (spelled with an "e" in history books but without in the reports). The first earl had the distinct pleasure of being Chancellor before Lord Nottingham (1672). "He was essentially a politician, and a strenuous advocate of the political cause with which he happened to be identified. His career shows us that he had some of the modern demagogue's contempt for legal technicalities when they impeded his programme, and all his reverence for them when they could be made to serve his purpose." 6 HOLDSWORTH 526. "He started from the conception of tolerance as Locke had done. . . . He may be regarded as the principal founder of that great party which, in opposition to the prerogative and to uniformity, has inscribed upon its banner political freedom and religious tolerance." 4 L. RANKE, HISTORY OF ENGLAND 166-67 (1875), quoted in 6 HOLDSWORTH 525 n.2. He was also the Shaftsbury of Shaftsbury v. Hannam, *supra* note 38 and accompanying text. The infant's father was an author of some repute. "His early education had been supervised by Locke." D. OGG, ENGLAND IN THE REIGN OF JAMES II AND WILLIAM III 541 (1963). It may be recalled that Locke had opposed Filmer's prerogative. *See* note 130 *supra*. His father died in 1713, at age 42. The infant earl was born in 1710.

> perceiving that his Lordship [the infant] had not a proper Governor provided for him by the Countess his Mother, and that the Person who was ordered to attend him as his Gentleman, was not a fit Person for the Purpose, petitioned the Lord Chancellor, that he, as sole surviving Guardian, might have the Ordering, as he should think proper, of such Governor, Gentleman and other Servants to attend the said Infant Earl, and that the Person of the said Infant Earl might be delivered over to the Petitioner.[142]

Justice Eyre, as testamentary guardian, was entitled to custody of the infant. After *Beaufort v. Berty*, however, the court might refuse custody (though, of course, in *Beaufort* the court merely oversaw the infant's education) if there were the least suspicion that the infant would suffer thereby. The Countess accordingly answered as follows:

> [T]he Crown, as *Parens patriae*, was the Supreme Guardian and Superintendent over all Infants; and since this was a Trust, it was consequently in the Discretion of the Court, whether or no they would do so hard a Thing, as to take away an Infant under thirteen Years of Age, from so careful a Mother as the Countess was; that the tender Calls of Nature were on the Mother's Side; and then there were two Physicians . . . who both testified, that the Infant Earl was of a tender and sickly Constitution.[143]

It is ironic that the Countess of Shaftsbury should have relied upon the king's role as "parens patriae," a concept related historically to his prerogatives, when the Shaftsburys had long opposed the king's prerogatives.[144] It also is interesting that "parens patriae" should have been used against Justice Eyre, who five years before had denied the king the use of the prerogative.[145]

Lord Macclesfield said that the will's disposition of the guardianship would be binding, unless Justice Eyre misbehaved. He thought the Justice should not send the infant to public school "which may be thought likely to instill into him Notions of Slavery,"[146] but allowed Justice Eyre to appoint the infant's

142. 2 P. Wms. at 103, 24 Eng. Rep. at 659.
143. 2 P. Wms. at 104, 24 Eng. Rep. at 659.
144. *See* note 139 *supra*.
145. *See* note 131 *supra* and accompanying text.
146. 2 P. Wms. at 108, 24 Eng. Rep. at 661.

governor and gentleman. Justice Eyre evidently agreed that the infant should remain in his mother's custody, and Macclesfield so ordered.

Two years passed. Lord Macclesfield was no longer chancellor.[147] Justice Eyre petitioned the court again, asserting that the infant had been married without his permission and praying that he be granted custody. The Countess cross-petitioned, asking that Lord Macclesfield's previous order be set aside. The infant earl cross-petitioned, asking that he be permitted to choose his own guardian.

The court (three Lord Commissioners: Sir Joseph Jekyll, Mr. Baron Gilbert,[148] and Mr. J. Raymond) ordered Countess Shaftsbury sequestered because of her contempt in effecting the marriage of the infant earl without the permission of his guardian and without applying to the court.

The infant's objection was ultimately stated and faced as the following:

> [T]ho' the Court might, upon a Petition, make a provisional Order for the taking Care of an Infant, yet that they ought not to make an Order determining the Right of Guardianship, unless the Matter be brought judicially before them, by Bill, Answer, and Proofs.[149]

The infant asked that the Justice be required to bring a bill for guardianship. Evidently the Justice had brought a petition praying for enforcement of Macclesfield's order.

Jekyll responded as follows:

> In this Case, here are a Bill and Answer, and both the Will, and the Devise of the Guardianship, are set out by the Bill, whereupon the Decree says, *That the Trusts of the Will shall be performed*, one of which said Trusts is the Guardianship of the Infant.[150]

Jekyll was referring to the bill that Eyre had brought two years earlier. He was not satisfied, however, to rest solely on that bill. He continued:

147. Lord Macclesfield had been impeached. He was evidently involved in using the chancery's funds for speculation. The funds were lost. *See* 1 HOLDSWORTH 440.

148. The author of GILBERT'S CASES IN EQUITY, *supra* note 138, HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY (1758), among other works.

149. 2 P. Wms. at 117, 24 Eng. Rep. at 664.

150. 2 P. Wms. at 118, 24 Eng. Rep. at 664.

> [T]his Court may, upon Petition only, without any Bill or Decree, make on Order to determine the Right of Guardianship, in Regard the Care of all Infants is lodged in the King as *Pater Patriae*, any by the King this Care is delegated to his Court of Chancery.[151]

Having firmly established the king as "parens patriae" to infants for the first time in an important case, Jekyll went on to compare infants with idiots, lunatics, and charities.

> In *F.N.B.*[152] 232. the King is bound, of common Right, and by the Laws to defend his Subjects, their Goods and Chattels, Lands and Tenements, and by the Law of this Realm, every loyal Subject is taken to be within the King's Protection, for which Reason it is, that Ideots and Lunaticks, who are uncapable to take Care of themselves, are provided for by the King as *Pater Patriae*, and there is the same Reason to extend this Care to Infants.
>
> This is the Reason given in the Write *de Ideota Inquirendo*, which the King issues out to take Care of him, who *Regimini sui ipsius, & bonorum, & terrarum suarum, minime sufficit*, which Reason also appears in the Write *de Lunatico Inquirendo*, and in 4 *Rep.* (*Beverley's* Case) Infants, as well as Ideots, are said to be under the Care and Protection of the Crown, as Persons equally unable to take Care of themselves.
>
> In like Manner, in the Case of Charity, the King, *pro bono publico*, has an original Right to superintend the Care thereof, so that, abstracted from the Statute of *Eliz.* relating to charitable Uses, and antecedent to it, as well as since, it has been every Day's Practice to file Informations in Chancery in the Attorney General's Name for the Establishment of Charities.[153]

Jekyll also cited and repeated much of *Falkland v. Bertie* and

151. *Id.*
152. A. FITZHERBERT, DE NATURA BREVIUM, *supra* note 57.
153. 2 P. Wms. at 118-19, 24 Eng. Rep. at 664.

referred to *Tenham and Barret.*[154] The court evidently granted custody to Justice Eyre.[155]

IV. The Cases After Beaufort and Eyre

Beaufort and *Eyre* were breakthroughs.[156] Broadly, *Beaufort* had established that chancery could make orders against testamentary and socage guardians whenever the chancellor felt the infant would suffer without such regulation. The court could at least regulate education and if the guardian misbehaved so as to possibly prejudice the infant, the court could remove him. Broadly, *Eyre* had established that chancery need not wait for a "proper bill." Upon any petition, if the need were shown, the chancellor would act, because the chancellor acted for the king, who was "parens patriae."

For thirty years, the court's orders grew broader in scope but were limited to testamentary and socage guardians. In *Goodall v. Harris*,[157] a testamentary guardian was removed by Lord King because the guardian had committed a breach of trust in marrying his ward to his son, the son having no estate and being apprenticed to a peruke-maker. In *Smith v. Smith*,[158] Lord

154. The case referred to is Teynham v. Lennard, 4 Brown Parl. Rep. 302, 2 Eng. Rep. 204 (H.L. 1724), reported below as Reynolds v. Tenham, 9 Mod. 40, 88 Eng. Rep. 302 (Ch. 1722). The report is a mere summary of the arguments of counsel and the disposition by the House. The argument of counsel supporting a testamentary guardianship in Tenham concluded as follows: "[A]ll these matters had been fully heard and determined by the Lord Chancellor, who was entrusted with the exercise of that part of the prerogative of the Crown, which concerned the guardianship of the persons and estates of infants, and to whom, by the law of the land, it belonged to appoint guardians." 4 Brown Parl. Rep. at 305, 2 Eng. Rep. at 207. *Teynham* may have been decided April, 1724? *Eyre* was decided May 15, 1724.

155. When speaking to another issue, Jekyll also said the following: "This Court has the Care, but not the Guardianship of Infants." 2 P. Wms. at 117, 24 Eng. Rep. at 664. It has already been noted that "guardianship" implied a greater degree of control by the court than did "care." *See* note 43 *supra.* Of course, both in *Beaufort* and in *Eyre* the Court said it could regulate education and could remove guardians for misbehavior. "Guardianship" also implied a greater reach of cases, since "guardianship" had no historic bounds once the king no longer had wards. On the other hand, "care" had always been limited to cases properly before the court because there was an estate issue the chancellor could adjudicate upon or there was an accounting. Of course, *Beaufort* was a case in which, while there was a will, there was *no* dispute as to it and there was *no* financial interest in the testamentary guardian. *See* text following note 132 *supra.* No distinction between "guardianship" and "care" was ever clearly maintained.

156. *Eyre* has usually been given as authority for chancery's jurisdiction over the persons and property of infants. *See* J. Story, *supra* note 47, at § 1333; 4 J. Pomeroy, *supra* note 47, at § 1304.

157. 2 P. Wms. 561, 24 Eng. Rep. 862 (Ch. 1729). *See Ex Parte* Champney, 1 Dick. 350, 21 Eng. Rep. 304 (Ch. 1762) (guardian appointed where testamentary guardian declined guardianship).

158. 3 Atk. 304, 26 Eng. Rep. 977 (Ch. 1745). *See* Roach v. Garvan, 1 Dick. 88, 21 Eng. Rep. 201 (Ch. 1747) (same).

Hardwicke ordered the enamored Mr. Barry not to marry the ward of a testamentary guardian without leave of court. His Lordship also ordered Mr. Barry to produce all letters containing promises of marriage. In *Ex parte Whitfield*,[159] Lord Hardwicke questioned his authority to allow a maintenance for a ward of a guardian in socage. Sir Joseph Jekyll had done so twice, but his Lordship questioned whether Jekyll had done so properly without some cause pending before him. However, upon being shown *Tenham and Barret*,[160] Lord Hardwicke concluded that guardians who were strangers were not to be trusted very much. His Lordship should have been shown *Beaufort* and *Eyre*.

In 1756, the case of *Butler v. Freeman* came before Lord Hardwicke.[161] A father had put his infant son into the care of another for his education. Several persons seduced the infant away and had him married. The father brought a petition to hold the seducers in contempt of court. The seducers argued that since the infant's father was still alive, the court could not be his guardian. His Lordship answered that the court was not acting through guardianship. Rather the court "has a general right delegated by the Crown, as *pater patriae*, to interfere in particular cases, for the benefit of such who are incapable to protect themselves."[162] Lord Hardwicke added that there need only be a suit "relative to the infant or his estate"[163] for the court to act.

The case thus adopted the broad *Eyre* principle that any petition alleging harm to an infant would suffice for jurisdiction. But the use of "parens patriae" did something more. *Eyre* could legitimately be said to be limited to infants who were *wards*. *Butler* allowed the court to interfere even though the infant's father was alive.

In 1790, in *Creuze v. Hunter*,[164] a mother asked the court to restrain her husband from interfering in his son's education. The son was entitled to a considerable estate under the will of his grandfather. A marginal note in Cox's Reports says that case concerned a ward of the court. But the court did not say

159. 2 Atk. 330, 26 Eng. Rep. 592 (Ch. 1742).
160. *See* note 152 *supra*. *See also* notes 13 and 136 *supra*.
161. Amb. 301, 27 Eng. Rep. 204 (Ch. 1756).
162. *Id.* at 302, 27 Eng. Rep. 204 (Ch. 1756).
163. *Id.* at 303, 27 Eng. Rep. 205.
164. 2 Cox 242, 30 Eng. Rep. 113 (Ch. 1790). *See* Wilcox v. Drake 2 Dick. 631, 21 Eng. Rep. 473 (Ch. 1784) (same); ex parte Warner 4 Bro. Ch. Rep. 101, 29 Eng. Rep. 799 (Ch. 1792) (same).

it did. Lord Thurlow, however, "was of opinion that this Court had arms long enough to reach such a case, and prevent a parent from prejudicing the health or future prospects of the child."[165]

In 1817, *Shelley v. Westbrooke*[166] came before the court. It appeared that the poet Shelley had deserted his wife and had cohabited with another. His wife took the children and went to her father's. The wife subsequently died, and Shelley petitioned for custody. It was alleged that Shelley had published a book which had "blasphemously derided the truth of the Christian revelation, and denied the existence of a God as creator of the universe."[167] The court thought Shelley's opinions were immoral and vicious, and therefore concluded that it would not be justified in delivering the children to Shelley for their education. A master was ordered to recommend under whose care the infants should remain during their minority.[168] *Quaere* whether Shelley should have brought a suit for custody in chancery rather than *habeas corpus* at Law?[169]

Finally, in 1827, Lord Eldon decided *Wellesley v. The Duke of Beaufort*.[170] It seems that a Mr. Wellesley was having an affair with a Mrs. Bligh. Mrs. Wellesley, as a consequence, took her children to her uncle's. Not long thereafter, she died. Mr. Wellesley brought *habeas corpus* against his sisters-in-law, who had custody of the children. The sisters-in-law in turn brought a petition in chancery to prevent his prosecution of the writ. The court was compelled to face the issue of its jurisdiction to detain the children from their father. Lord Eldon's opinion, in relevant part, was as follows:

> With respect to the doctrine that this authority [to make an order in the instant kind of case] belongs to the King as *parens patriae*, exercising a jurisdiction by this Court, it has been observed at the Bar, that the Court has not exercised that jurisdiction, unless there was property belonging to the infant to be taken care of

165. *Id.* at 243, 30 Eng. Rep. at 113.
166. Jac. 266, 37 Eng. Rep. 850 (Ch. 1817).
167. *Id.*
168. *See* Whitefield v. Hales, 12 Ves. 492, 33 Eng. Rep. 186 (Ch. 1806). *Cf.* DeManneville v. DeManneville, 10 Ves., Jr. 52, 32 Eng. Rep. 762 (Ch. 1804); Ball v. Ball, 2 Sim. 35, 57 Eng. Rep. 703 (Ch. 1827).
169. *See* Rex v. Demanneville, 5 East 221, 102 Eng. Rep. 1054 (K.B. 1804); *Ex parte* Skinner, 9 Moore 278 (C.P. 1824); Rex. V. Greenhill, 4 Ad. & Ell. 624, 111 Eng. Rep. 922 (K.B. 1836). *But see* Blisset's Case, Lofft 748, 98 Eng. Rep. 899 (K.B. 1831); Commonwealth v. Nutt, 4 Browne (Pa. C.P. 1810).
170. 2 Russ. 1, 38 Eng. Rep. 236 (Ch. 1827).

> in this Court. Now, whether that be an accurate view of the law or not; whether it is founded on what Lord *Hardwicke* says in the case of Butler v. Freeman, 'that there must be a suit depending relative to the infant or his estate,' (applying, however, the latter words rather to what the Court is to do with respect to the maintenance of infants); or whether it arises out of a necessity of another kind, namely, that the Court must have property in order to exercise this jurisdiction: —that is a question to which, perhaps, sufficient consideration has not been given. If any one will turn his mind attentively to the subject, he must see that this Court has not the means of acting, except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise that jurisdiction; because the Court cannot take on itself the maintenance of all the children in the kingdom.[171]

Lord Eldon's case authority was *Beaufort v. Berty*.[172] He also cited *Creuze v. Hunter*[173] and *DeManneville v. DeManneville*.[174]

Lord Eldon verbalized what the court had come to do after *Butler v. Freeman*.[175] The requirement that a proper bill be before the court through which it could make orders with respect to infants thus had been abandoned, carrying with it the necessity that the infants be wards. The insertion of "parens patriae" in *Eyre* and its use in *Butler* had made the transition relatively easy. The expression now not only signified the special care the court could give to infants who were properly before it but also implied the court could properly bring infants before it to give them special care.[176]

Wellesley v. The Duke of Beaufort went to the House of Lords and is commonly cited as *Wellesley v. Wellesley*.[177] Lord Redesdale spoke to the issue of jurisdiction at great length. His opinion, in part, was as follows:

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171. *Id.* at 20-21, 38 Eng. Rep. 243.
172. *See* text following note 132 *supra*.
173. *See* text following note 161 *supra*.
174. *See* note 165 *supra*.
175. *See* text following note 158 *supra*.
176. *See* notes 43 and 153 *supra*. "Parens patriae" had been similarly used to bring before the court many charities over which it had no statutory jurisdiction. *See* text between notes 88 and 103 *supra*.
177. 2 Bligh, N.S. 124, 4 Eng. Rep. 1078 (H.L. 1828).

What is the ground on which the opposition is made to this order? The opposition is founded on the right of the father to have the care and custody of his children. That right is not disputed by the order; but the question is, whether the father having that right, is to be at liberty to abuse that right. That is the real question. Why is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust reposed in him; for that it is a trust, of all trusts the most sacred, none of your Lordships can doubt . . . .

We find that now, for a hundred and fifty years, the Court of Chancery has assumed an authority with respect to the care of infants . . . .

Now, upon what does Lord Somers, upon what does Lord Nottingham, upon what does Lord Hardwicke, upon what ground does every Chancellor who has been sitting on the bench, in the Court of Chancery since that time, place the jurisdiction? They all say, that it is a right which devolves to the Crown, as *parens patriae*, and that it is the duty of the Crown to see that the child is properly taken care of . . . .

It is said, that there is nothing from which this jurisdiction can be inferred as belonging to the Court, except the *dicta* that may be found in books, and the actual exercise of it for one hundred and fifty years by persons who have sat in the Court of Chancery. If we look back to the constitution of the government of this country, there are many things which we cannot ascertain. Will any of your Lordships tell me how there comes to be a House of Commons and a House of Lords? I cannot tell . . . .

. . . If it were necessary to go back into times long past, to examine the grounds on which every law is administered, we should be involved in very great difficulties. But what has been the practice for a great number of years, has been held, not in this country alone, but in all countries, to be a ground for supposing that it was rightly done, on this supposition, that if it had been wrongfully done, it would not have been permitted to be continued.[178]

178. *Id.* at 128-36, 4 Eng. Rep. at 1080-83.